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Will both infringement and validity be determined by the same division or will they be heard separately?

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If an infringement action is initiated before the central division of the UPC and a counterclaim for invalidity is brought before the central division, both infringement and validity will be dealt with together.

If an infringement action is initiated before a local or regional division of the UPC and a counterclaim for invalidity of the patent is brought before the local or regional division concerned, Article 33.3 of the UPC Agreement foresees different scenarios:

- The local or regional division concerned may decide to proceed both with the infringement action and the counterclaim for invalidity together (in this case it has to request the allocation of a technically qualified judge with qualifications and experience in the field of technology concerned);
- it may alternatively decide to refer the counterclaim for invalidity for decision to the central division and, depending on the circumstances of the case, either suspend or proceed with the infringement action (Rule 37.4 of the draft Rules of Procedure of the UPC provides further guidance to the local or regional division on the criteria to consider when deciding whether to suspend or to proceed with the infringement action); or
- with the agreement of the parties, the local or regional division concerned may also decide to refer both the infringement action and the counterclaim for invalidity to the central division, where they will be dealt with together.

How will the UPC decide on whether or not to hear infringement and validity together?

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Article 33.3 of the UPC Agreement leaves it to the discretion of the local or regional division concerned to decide whether to proceed with the infringement action and the counterclaim for invalidity together or whether to refer the counterclaim for decision to the central division. In the latter case it is also left to the discretion of the division concerned whether to proceed with the infringement action or whether to stay the infringement proceedings and to wait for the counterclaim for invalidity to be decided on by the central division. It is expected that the division concerned will take these decisions taking into account all relevant circumstances of the case, including grounds of fairness to the parties.

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